

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

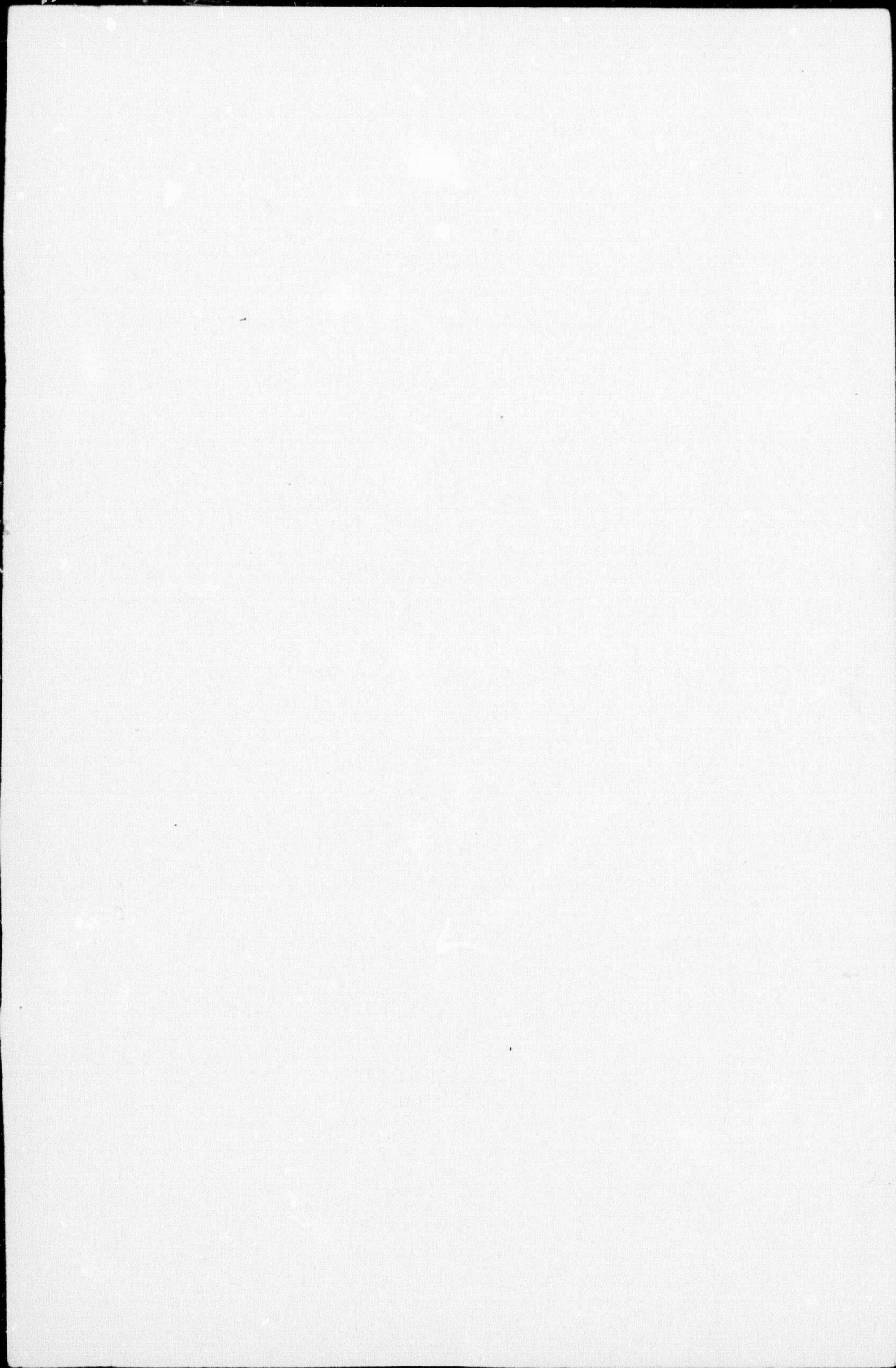


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**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-1537

UNITED STATES OF AMERICA,

Appellee,

—v.—

ANGELO LUIS ACEVEDO,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Angelo Luis Acevedo appeals from a judgment of conviction entered on September 7, 1977, in the United States District Court for the Southern District of New York, after a four day trial before the Honorable Kevin Thomas Duffy, United States District Judge, and a jury.

Indictment 77 Cr. 184, filed on March 11, 1977, in three counts, charged Acevedo with unlicensed dealing in firearms, in violation of Title 18, United States Code, Section 922(a)(1).

Trial commenced on July 6 1977. On July 11, 1977 the jury returned a verdict of guilty as to each of the three counts of the indictment.

On September 7, 1977, Judge Duffy imposed consecutive sentences of five years imprisonment on each count.

Acevedo presently is serving the sentence imposed by Judge Duffy.

Statement of Facts

The Government's Case

1. Summary

On three separate occasions in October and November 1976, Angelo Luis Acevedo illegally sold firearms to undercover Special Agent George McNenney of the Treasury Department's Bureau of Alcohol, Tobacco and Firearms. On October 5, 1976, Acevedo sold McNenney a .22 calibre Tpm revolver, with ammunition, for \$90.00; on the following day, October 6th, Acevedo sold McNenney a Colt .45 automatic handgun with five rounds of ammunition for \$180.00; and, on November 4, 1976, Acevedo delivered a 7.62 carbine together with sixty three rounds of ammunition to McNenney for \$75.00. (Tr. 67-69, 70-75, 76-77; GX 1, 3, 4 and 4A).^{*} Acevedo, who readily offered to supply larger shipments of weapons, was not a licensed dealer of firearms.

2. Acevedo Meets McNenney and Sells Him the Firearms

Agent McNenney, posing as someone interested in purchasing guns out of the regular course, first met Acevedo late in the afternoon of October 5, 1976. An informer introduced McNenney, known in his undercover capacity as "Chino," to Acevedo, known as "Luis," at

^{*} References to the trial transcript are abbreviated as "Tr.;" references to Government Exhibits are abbreviated as "GX;" references to defendant's brief on this appeal are cited as "Br."

Morrero's Grocery Store at 1936 Second Avenue, New York, New York. (Tr. 66, 93).*

After a brief conversation with Acevedo concerning operation of the grocery store, McNenney told Acevedo that he needed a handgun and asked if Acevedo knew where one could be obtained. Acevedo immediately offered McNenney a .22 caliber handgun with ammunition for \$90.00 and quickly produced the gun for examination. After examining the weapon, McNenney agreed to the sale and counted out \$90 for Acevedo. However, Acevedo declined to take the money personally, instead directing McNenney to "give it to Markie," an acquaintance of defendant's in the grocery store. Agent McNenney then gave the money to "Markie," who counted it and handed it to Acevedo.**

With their deal thus quickly completed, Acevedo told McNenney that he expected to receive a .45 calibre semi-automatic handgun in about an hour, and that if McNenney wanted such a higher caliber handgun it was available to him for \$180. McNenney expressed interest in such a purchase. He told Acevedo that he wanted guns for "things he had to do," and that when he was "finished with what [he] had to do" he would resell the weapons. (Tr. 70).

After McNenney left the grocery store Agent O'Brien, already on surveillance, followed him to a pre-arranged meeting point where McNenney turned over the .22 caliber pistol he had just purchased. (Tr. 27, GX 1).

* Outside the store McNenney's partner, Special Agent John O'Brien of the Treasury Department, and three detectives from the New York City Police Department and Housing Authority Police were conducting surveillance of this meeting. (Tr. 23-24, 66).

** "Markie" subsequently was identified as Joseph Mark Tolliver, a young man in the grocery store. (Tr. 66-69, 87).

Later that same afternoon October 5, 1976, Agent McNenney, again observed by O'Brien, returned to Morero's Grocery Store. (Tr. 30, 73). Acevedo, however, had gone out, but "Markie" was there and showed McNenney the .45 caliber handgun which Acevedo promised he would be receiving. (Tr. 71, GX 3). McNenney did not purchase the gun on that occasion.

The following morning, October 6, 1976, McNenney went back to the grocery store and met with Acevedo.* (Tr. 31, 72). McNenney asked Acevedo if the .45 pistol Markie had shown him the day before still was available. Acevedo went into the back room, brought out the .45 pistol with five rounds of ammunition, and immediately sold the weapon to McNenney for \$180. Acevedo cautioned McNenney, however, that future sales would be "on a first come, first serve" basis, suggesting by implication that McNenney should not delay his purchases if satisfied with the weapons offered for sale. (Tr. 74-75, GX 3). McNenney left the store and turned the weapon and ammunition over to Agent O'Brien. (Tr. 32-33, 75; GX 3).

On November 4, 1976, McNenney again went to Morero's Grocery Store.** At this meeting Acevedo offered McNenney a carbine and 63 rounds of ammunition for \$75. McNenney accepted the offer and bought the rifle. (Tr. 34, 75-76, GX 4 and 4A). Acevedo also stated that he had a "connection upstate" and asked McNenney if he was interested in large quantities of rifles. McNenney expressed interest in such a supply and Acevedo said he would contact McNenney after he checked with his connection. (Tr. 78).

Acevedo then wrapped in a woman's coat the rifle which he had just sold to McNenney and carried it out to

* Once again O'Brien and the detectives waited outside.

** Agent O'Brien, who also testified at trial, again was on surveillance with several agents from his squad.

the trunk of McNenney's car. Acevedo lauded this practice to McNenney, telling him that if the police stopped him they would have to get a search warrant for the trunk. (Tr. 34, 85, 116, GX 4 and 4A). McNenney, followed by O'Brien, then drove off to a prearranged meeting spot where the two agents removed the rifle from the trunk where Acevedo had put it. (Tr. 62, 120-21).

3. Subsequent Negotiations with Acevedo and Defendant's Arrest

McNenney had two additional meetings with Acevedo after the sales of the weapons. On November 10, 1976, Acevedo took McNenney into the back room of Morrero's Grocery for a private conversation. Acevedo told McNenney that he owned a machine gun but did not currently have possession of it, and that he, Acevedo, was very interested in a potential deal in which he could trade rifles from upstate for handguns. (Tr. 78-9).

On January 5, 1977, McNenney, accompanied by O'Brien, drove to Morrero's. McNenney brought Acevedo outside to the automobile in which O'Brien waited, and introduced Agent O'Brien to Acevedo as a potential business associate in Acevedo's proposed future exchange of rifles for handguns. McNenney introduced Acevedo to O'Brien as "... the fellow who might be able to do business with you." After a brief discussion, Acevedo left McNenney with a request to "... let me know when you can get anything."* (Tr. 37-40, 83-85).

A week later, on January 12, 1977, Special Agent O'Brien, along with several other agents and New York City police officers, arrested Acevedo at his store. (Tr. 40).

* The actual purpose of the meeting was to allow Special Agent O'Brien, the case officer assigned to make the arrest, to see Acevedo at close quarters.

A search of the records of the regulatory index and records of the Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury, disclosed that Acevedo had no license to deal in firearms. (Tr. 28-29, GX 2).

The Defense Case

Acevedo presented no evidence.

A R G U M E N T

POINT I

The Prosecutor's Remarks Did Not Deprive Acevedo of A Fair Trial.

Acevedo contends that certain comments by the prosecutor during opening and summation, to which no objection was made by experienced trial counsel, deprived defendant of a fair trial and amounted to an improper reference to his failure to testify. Viewed in the context of the overall remarks to the jury, it is clear that Acevedo has greatly exaggerated the claimed prejudice of these remarks and that the prosecutor's statements were fair and proper comments on the significance of this case to society and to the Government.

Specifically, Acevedo first complains that the Assistant United States Attorney placed undue emphasis in his opening and summation on the obvious potential abuses of the guns sold in this case, and thereby inflamed the jury against him.* Second, Acevedo asserts that the

* Specifically, Acevedo takes issue with the prosecutor's statement in his opening that "in a kind of small time way. . . Acevedo was a merchant of death, because that is what . . . guns are used for;" and his invitation to the jury in summation to look upon the guns during their deliberations, bearing in mind that they "are nothing more or less than instruments of death" and "... a plague . . . on this city." (Tr. 10, 172).

prosecutor improperly alluded to defendant's failure to testify in his own behalf by telling the jury that they had heard an "uncontradicted story." (Br. 9, Tr. 172).*

It is a complete answer to Acevedo's present appellate claims that none of the comments now urged to require reversal were the basis of any objection at the time by trial counsel. This failure to object waives any right to appellate review of the issue. *United States v. Nemes*, 555 F.2d 51 (2d Cir. 1977); *United States v. Ong*, 541 F.2d 331, 342 (2d Cir. 1976), *cert. denied*, 429 U.S. 1075 (1977); *United States v. Diviglio*, 352 F.2d 276, 280 (2d Cir. 1965), *cert. denied*, 383 U.S. 907 (1966).

Moreover, the failure of trial counsel to take objection to any of the prosecutor's remarks on the danger of guns bespeaks his own recognition that, in their context, the remarks were not unfair argument and did not prejudice Acevedo to the degree claimed. While the prosecutor at times employed pointed descriptions, he did so only in the brief context of fairly stressing the importance of the case and calling attention to the obvious social consequences of illicit dealings in dangerous weapons such as guns, the subject matter of the instant charges. The prosecutor did not dwell on such topics, but focused his argument on the evidence in the case, and even cautioned the jury in the same context, "you are compelled to do

* The prosecutor summed up in pertinent part as follows:

"You are compelled to do nothing by me, but by the evidence. What you heard from the witnesses was an uncontradicted and entirely truthful story. Uncontradicted by any evidence in this case to the contrary as to the defendant's guilt. It's very simple. In order for you to believe that the defendant did not commit the crime of which he is accused, you must accept the fact that Agent McNeeney and Agent O'Brien are lying through their teeth. That is it. Either they are telling the truth, in essence, or they are not." (Tr. 172-73).

nothing by me, but by the evidence." (Tr. 172). Taken in proper context, the prosecutor's arguments simply cannot be considered to have been intemperate, calculated to mislead the jury, *Berger v. United States*, 285 U.S. 78, 85 (1935), or a distortion of the record. *United States v. Tomaiolo*, 249 F.2d 683, 694 (2d Cir. 1957).*

In an analogous context, this Court expressly has recognized the propriety of Government counsel arguing to the jury the dangers to society especially inherent in the illegal conduct charged in the indictment. Thus, in *United States v. Ramos*, 268 F.2d 878 (2d Cir. 1959), this Court found proper the prosecutor's remarks which called attention of the jury to the "vicious business" of narcotics trade and the description of the sales there involved as "representing \$1,265 worth of human degradation." 268 F.2d at 880. In finding no error, the Court in *Ramos* stressed that "within reasonable limitations," the prosecutor was entitled

"to emphasize the importance of the case by calling attention to the unsavory nature and the social consequences of illicit traffic in narcotics—consequences far more serious than those flowing, for instance, from illicit traffic in lottery tickets or in untaxed liquor."

* In this last respect, Acevedo appears to take issue with the suggestion that anything in the record demonstrated his indifference to the potential violent use of the guns sold in this case. Even a cursory review of the record, however, shows beyond question that the jury was entitled to conclude that Acevedo cared only for his financial interest in selling the guns, regardless of the purchaser's intended use. McNenney specifically told Acevedo that he intended to resell the guns after he finished with "what [he] had to do." Acevedo further expressed interest in a large scale operation to sell handguns for rifles. In the context of Acevedo's secretive sales, these events clearly displayed defendant's indifference to the use of the weapons.

See also, *United States v. Wilner*, 523 F.2d 68, 73 (2d Cir. 1975) (prosecutor's comment on "problems of drugs"); *United States v. Kowalski*, 502 F.2d 203, 206 (7th Cir. 1974), cert. denied, 420 U.S. 979 (1975) (prosecutor's reference to weapon sold by defendant as "sniper's gun"); *United States v. Murphy*, 480 F.2d 256 (1st Cir. 1973), cert. denied, 414 U.S. 912 (1973) (prosecutor referred to potential impact "accommodating" meat inspection might have on quality of meat sold to consumers, in trial of meat inspector for accepting money). See generally, *United States v. Clark*, 525 F.2d 314 (2d Cir. 1975).

Measured by the standards set forth in *Ramos*, the prosecutor's brief stress on the deadly nature of Acevedo's stock in trade cannot be said to have been improper, especially where the Government's remarks, in their virtual entirety, were properly directed at the evidence. *United States v. Durham*, 319 F.2d 590 (4th Cir. 1963).*

Finally, Acevedo greatly has exaggerated the claimed prejudice of the prosecutor's remarks on the danger of

* Judge Learned Hand's observations in *DiCarlo v. United States*, 6 F.2d 364, 365 (2d Cir. 1925), are particularly apposite to this case:

"While, of course, we recognize that the prosecution is by custom more rigidly limited than the defense, we must decline to assimilate its position to that of either judge or jury, or to confine a prosecuting attorney to an impartial statement of the evidence. He is an advocate, and it is entirely proper for him as earnestly as he can to persuade the jury of the truth of his side, of which he ought to be thoroughly convinced before he begins at all. To shear him of all oratorical emphasis, while leaving wide latitude to the defense, is to load the scales of justice; it is to deny what has always been an accepted incident of jury trials, except in those jurisdictions where any serious execution of the criminal law has yielded to a ghostly phantom of the innocent man falsely convicted."

weapons. The general comment on the possible use of such weaponry did no more than state the obvious. In any event, the District Court's charge went to some lengths to discourage speculation on this point and therefore assuredly dissipated any prejudice that arguably might have resulted. (Tr. 70, 212-13).

Equally unpersuasive is Acevedo's related claim that his conviction should be reversed—again in the absence of timely objection—because of the Government's summation statements to the effect that the jury had heard an “uncontradicted” story. This Court repeatedly has held that a prosecutor properly may comment upon the defense's failure to contradict the Government's case, and, in turn, upon the strength of the Government's case, so long as it is not the defendant *alone* who has the information to contradict the government's evidence, and the language used does not invite the jury “naturally and necessarily” to interpret the remark as a comment on the defendant's failure to testify. *United States v. Bubar*, Dkt. Nos. 76-1140, 1161-64, 76-1204, 1306, slip op. 4519, 4531 (2d Cir. June 30, 1977); *United States v. Rodriguez*, 545 F.2d 829, 832 (2d Cir. 1977). See also, *United States v. Floyd*, 555 F.2d 45 (2d Cir. 1977); *United States ex rel. Leak v. Follette*, 418 F.2d 1266, 1269-70 (2d Cir. 1969), *cert. denied*, 397 U.S. 1050 (1970). Judged by these principles, the reference to an “uncontradicted story” was not improper.

It is crystal clear from the record here that both “Markie” Tolliver, who was present at two of the most significant conversations with Acevedo, and the informant—both of whom were available to the defense—were in a position to have knowledge of the events about which Special Agents McNeeney and O'Brien testified.* Thus,

* Indeed, Acevedo at first wanted his counsel to call Tolliver as a witness. See Point III, *infra*.

the prosecutor's statements were not directed to matters which Acevedo alone was in a position to controvert. Moreover, Acevedo's trial counsel, through his cross examination and later in summation, plainly implied that McNenney lied about the circumstances in which the guns had been acquired. (Tr. 56-57, 59, 102, 109, 188-91). In the face of this defense, it was clearly proper for the prosecutor to comment upon the strength of the Government's case, and, in particular, the absence of any motive for the agent to testify falsely, particularly since there were others beside the defendant present at some of these conversations. Indeed, once a defendant interjects a defense, whether through counsel's questions, evidence or argument, the Government is free to comment upon its plausibility as well as upon the strength of its evidentiary support. See *United States v. Lipton*, 467 F.2d 1161, 1168 n.15 (2d Cir. 1972), *cert. denied*, 410 U.S. 927 (1973).

Finally, any possible prejudice to Acevedo arising from the alleged confusion on the part of the jury as to the Government's burden of proof and the defendant's absolute right to silence, was eliminated by the trial court's explicit instruction that a defendant need not put in any evidence.* *United States v. Dioguardi*, 492 F.2d 70 (2d

* "The Court: You must bear in mind, and that I cannot emphasize too much, that in a criminal case, the law does not impose on a defendant the burden or duty of calling any witness, or producing any evidence. That is most important. . . The defendant has pleaded not guilty. The government has the burden of proof beyond a reasonable doubt of each of the elements of each of the charges alleged in the indictment. The defendant does not have to prove his innocence. On the contrary, he is presumed innocent. . . . The law does not impose on the defendant the duty of producing any witnesses, nor is the defendant called upon to testify. Please don't speculate as to why he did not testify. You are to draw no inference whatsoever from the defendant becoming a witness or not. He is entitled to that presumption of innocence and that presumption of innocence continues with him throughout the trial. He need do nothing, nothing more." (Tr. 207, 209-10).

Cir. 1972), *cert. denied*, 419 U.S. 829 (1974). Under these circumstances, any error in the prosecutor's comment was cured by the trial court, *Haberstroh v. Montano*, 493 F.2d 483 (2d Cir. 1974), and should not occasion reversal of the conviction.

POINT II

The District Court Properly Declined to Order A Competency Examination of Acevedo.

Acevedo contends that the trial court erred in refusing to order a competency examination of him pursuant to Title 18, United States Code, Section 4244. This argument is premised upon Acevedo's behavior during jury selection, which Judge Duffy explicitly found to have been no more than an example of defendant's contumacious conduct.

The test of a defendant's competence to stand trial was stated by the Supreme Court in *Dusky v. United States*, 362 U.S. 402 (1960):

"whether [defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him."

This Court recently has emphasized that whether "reasonable cause" exists to believe that a defendant is "so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense," is a matter left to the sound discretion of the District Court. *United States v. Newfield*, 565 F.2d 203 (2d Cir. 1977); *United States v. Hall*, 523 F.2d 665, 667 (2d Cir. 1975); *United States v. Vowteras*, 500 F.2d 1210, 1212 (2d Cir.), *cert. denied*, 419 U.S. 1069 (1974); *United States v. Marshall*, 458 F.2d 446, 450 (2d Cir.

1972); *Zouhick v. United States*, 448 F.2d 339, 342 (2d Cir. 1971), *cert. denied*, 405 U.S. 1043 (1972). The record here makes clear that Judge Duffy did not abuse his discretion in determining that no reasonable cause existed to believe that defendant was incompetent, and therefore correctly refused to order a psychiatric examination.

In the course of jury selection, Acevedo engaged in certain contumacious outbursts which, while designed to disrupt the orderly trial proceedings, did not manifest incoherence, disorientation or any kind of lack of comprehension of the proceedings. Thereafter, on the sole basis of this conduct, trial counsel moved for a psychiatric examination. Defense counsel did not claim a history of mental illness, care under the supervision of a physician, repeated hospitalizations, or suicide attempts, see *Wojtowicz v. United States*, 550 F.2d 786 (2d Cir.), *cert. denied*, 431 U.S. 972 (1977); *Saddler v. United States*, 531 F.2d 83 (2d Cir. 1976); nor did he suggest any basis for belief that Acevedo was incompetent other than the fact that Acevedo never had acted disruptively with him in private in the past.*

In response to counsel's motion the District Court, having had a full opportunity to observe Acevedo at several pre-trial proceedings and to evaluate first hand his conduct during jury selection, later made specific findings that Acevedo's behavior was intentionally calculated to cause a mistrial and was not the result of any

* Even a documented history of mental illness does not automatically compel a finding of incompetency. *United States v. Adams*, 297 F. Supp. 596, 597, (S.D.N.Y. 1969). Disruptive behavior does not always mandate a competency examination; and such a motion, calling for more than a ministerial response, should not automatically be granted. *United States v. Taylor*, 437 F.2d 371, 376 n.7 (4th Cir. 1971).

psychiatric disability.* These findings clearly were correct and supported by developments both before and after the motion for an examination.

* "Mr. Levites: Your Honor, yesterday defense counsel made an application for psychiatric examination which your Honor saw fit to deny. The government concurs with that, of course, if defense counsel wishes to withdraw that application, we can proceed. But if not, I would respectfully request that the Court make certain findings of fact on the record as to the lucidity with which the defendant advanced arguments for change in his bail status and as to his behavior, his appearance on prior occasions before the Court, which gave no evidence of disorderly behavior.

The Court: There was absolutely no evidence of any disorderly behavior prior to this time, with the exception of a remark one time that he was remanded, that he was remanded for a short period of time. He commented, "What is this, Cuba," as he walked out. It was clear to me throughout the entire day yesterday that Mr. Acevedo is what is called street wise. He may not have a formal education, but he was trying to cause a mistrial throughout the entire day yesterday. The fact that he opened his pants and took out his penis and was about to urinate on the rug in the courtroom yesterday while the jury was being picked was clearly an attempt to irritate and annoy me and cause a mistrial. He was held in contempt seven times yesterday for the very simple reason, and it was clear to me, that the man was lucid, knew exactly what he was doing, knew exactly what he was attempting, and clearly was not in need of psychiatric help. I gather that being street wise means not only that the man learns law from the streets of the city, but in this particular case from the training in the area which he had while he resided in prison. I see no reason whatsoever for psychiatric examination at this time.

Mr. Levites: Thank you.

Mr. Eibel: Your Honor, may I state for the record in connection with that statement that has been made and the finding, I have been representing this defendant since March 10, 1977. I have interviewed him many times. I have appeared with him in court otherwise. The conduct yesterday in court over the sustained period was according to my experience with him, completely out of character. I don't have any expertise in psychiatric or other matters of a similar nature, your Honor. I

[Footnote continued on following page]

Acevedo's earlier actions during jury selection simply did not suggest any basis to suspect an impairment of his ability to comprehend the proceedings or to work with his counsel; rather, they merely displayed a knowing and planned defiance of the Court's lawful authority. Moreover, the district judge's conclusions later were vindicated by Acevedo's continued lucid, albeit occasionally disorderly, comments about the case to the District Court and counsel during the trial. (See, e.g. Tr. 152-55, 157, 159, 161-62, 164-65, 171, 179, 184, 198). Finally, Acevedo ultimately apologized to the trial court for his behavior, thereby erasing any possible doubt that his behavior had been intentional and not the by-product of mental incompetence. (Tr. of proceedings, Sept. 7, 1977 16).*

was motivated in a desire to protect the defendant, to ascertain whether this manifestation had a basis other than just contemptuous, and so I made the application.

The Court: Mr. Eibel—

Mr. Eibel: I'm not saying that your Honor is criticizing me.

The Court: I certainly am not.

Mr. Eibel: I made the application in good faith, I even renew it at this time, if your Honor were disposed to entertain it. I think that based upon what I have said so far, there should be an inquiry to ascertain whether or not there is some basis for it, other than contemptuous disorder.

The Court: All I have seen so far is contemptuous disorder brought on by hostility, not only for the Court and not only for me personally. I don't particularly care about that, but for the Court and the system of justice that we have. I don't see it as anything even coming close to a manifestation of a psychological or psychiatric break-down. Under the circumstances, I guess formally I will have to deny your second motion, also for the same reason. (Tr. 17-19).

* The utter lack of merit to defendant's claim is best demonstrated by Acevedo's separate contention that he was deprived effective assistance of counsel because his trial lawyer refused to follow defendant's *own trial strategy*. Indeed, Acevedo's own brief concedes that defendant was actively and intelligently involved in tactical and factual consultations with trial counsel throughout the proceedings (Br. 14-16). These conflicting claims make clear that defendant's contention that a hearing should have been held is frivolous in the extreme.

POINT III

Acevedo Was Not Denied Effective Assistance of Counsel At Trial.

Although Acevedo concedes that his counsel's representation at trial in almost all respects was "unassailable," defendant nonetheless argues that he was denied effective assistance of counsel because his attorney refused to call certain witness on his behalf. (Br. 15)

The well established and long adhered to standard in this Circuit for judging claims of ineffective assistance of counsel is that:

"[U]nless the purported representation by counsel was such as to make the trial a farce and a mockery of justice, mere allegations of incompetency or inefficiency of counsel will not ordinarily suffice

A lack of effective assistance of counsel must be of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice. . . ."

United States v. Bubar, *supra*, slip op. at 4536, quoting *Rickenbacker v. Warden*, 550 F.2d 62, 65 (2d Cir. 1976), *cert. denied*, 46 U.S.L.W. 8215 (U.S., Oct. 4, 1977) and *United States v. Wigd*, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950). See also, *United States v. Morales*, Dkt. No. 77-1359, slip op. 377, 390 (2d Cir., Nov. 16, 1977); *LiPuma v. Commissioner*, 560 F.2d 84 (2d Cir., 1977); *United States v. Rodriguez*, 556 F.2d 638, 642 (2d Cir. 1977); *United States v. Medico*, 557 F.2d 309, 318-19 (2d Cir. 1977); *United States v. Taylor*, 562 F.2d 1345, 1360 (2d Cir. 1977); *Lunz v. Henderson*, 533 F.2d 1322, 1327 (2d Cir.), *cert. denied*, 429 U.S. 849 (1976); *United States ex rel King v. Schublin*, 522

F.2d 527, 529 (2d Cir.), *cert. denied*, 423 U.S. 990 (1975); *United States v. Yanichofsky*, 500 F.2d 1327, 1333 (2d Cir. 1974); *United States ex rel Testamark v. Vincent*, 496 F.2d 641, 643 (2d Cir. 1974), *cert. denied*, 421 U.S. 951 (1975). Indeed, it is plain, as Acevedo virtually concedes, that trial counsel provided "the reasonably competent assistance of an attorney acting as [the defendant's] diligent conscientious advocate" *United States v. Tolliver*, Dkt. No. 77-1017, slip op. 863, 877 (2d Cir., Jan. 3, 1978), and Acevedo's claim must be rejected.

Preliminarily, as Acevedo appears to recognize, his trial counsel did a more than adequate job in conducting cross-examination, delivering an opening statement and closing argument to the jury.* Indeed, in the face of the strength of the Government's case, which consisted of three hand to hand transactions with a government undercover agent and substantial corroboration by another agent, trial counsel valiantly and effectively attempted to raise issues as best he could from the record.

Acevedo asserts, however, that his attorney failed to interview, subpoena or call James Mark Tolliver, the young man from Acevedo's store who participated in the initial sale and who had subsequent conversations with the agents; that the trial attorney was inept for not locating and calling the informer who had introduced the undercover agent to Acevedo; and, that counsel failed to

* At trial, Acevedo himself, while bitterly complaining to the district judge that his lawyer "ignored" his trial strategy, nonetheless praised his attorney: "the attorney . . . he helps me with a lot of things . . .;" "The lawyer, I believe, so far has defended me very well from a legal point of view in front of the Court," and, "I don't have anything against him that he should continue representing me. I accept that he should represent me." (Tr. 161-62).

interview "two or three witnesses . . . who would say that selling guns was not has business." (Br. 15-16). None of these allegations support defendant's claim of ineffective assistance of counsel.

As to "Markie" Tolliver, the Government secured his presence in court as a potential witness from the very first day of the trial and continuously thereafter until conclusion of the trial. (Tr. 6, 21, 159-60). Defense counsel knew that Tolliver had been subpoenaed by the Government, and therefore had no need to subpoena him. Moreover, Acevedo's trial attorney did attempt to interview "Markie," but was unable to elicit any factual response from him. Tolliver's refusal to talk with counsel well may have been motivated by his fear as the evidence made clear, that possibly he was subject to prosecution for participation in Acevedo's crimes. (Tr. 135-36, 150, 153-53). In any event, counsel hardly can be faulted for refusing to call as a defense witness someone of whose proposed testimony he was unsure.*

Similarly, the record is clear that the "significant defense witness," whose attendance at trial Acevedo claims his counsel failed to secure, was the *informer* who introduced Special Agent McNenney to Acevedo. Although Acevedo did not supply the name of this person to his counsel until the close of the Government's case, defense counsel promptly requested assistance in finding the witness and the Government located and produced him. (Tr. 155-57; Tr. of proceedings, Sept. 7, 1977, at 6-7). Acevedo's trial lawyer then conferred with the witness, (Tr. 164-66), but chose not to call him since his testi-

* In fact, Judge Duffy explicitly made this point at trial:

"The Court: But Mr. Eibel also has a professional responsibility to know what Markie is going to say when he puts him on the stand. I understand that. It's pretty hairy to put someone on the stand without knowing what they are going to testify to." (Tr. 158).

mony would have been devastating to Acevedo. (Tr. 166-67).*

Moreover, Acevedo's conclusion is beguiling that he suffered from counsel's failure to call witnesses who could testify that his business was not in gun dealings. Acevedo was aware that his proposed witnesses from the community had no personal knowledge of the acts alleged in the indictment, (Tr. 164), and therefore would not have been permitted to testify that "selling guns was not his business."

Finally, even if defendant's present allegations were meritorious, they would not make out a claim of ineffective assistance of counsel. Since in determining the competence of counsel the focus is on the actual conduct of the trial, mere claims that counsel failed to consult sufficiently with his client and failed to explore or prepare the facts of the case in detail have consistently been held not to establish ineffective assistance of counsel. See e.g., *United States v. Ortega-Alvarez*, 506 F.2d 455 (2d Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *United States v. Tribote*, 297 F.2d 598 (2d Cir. 1961); *United States v. Waters*, 461 F.2d 248 (10th Cir.), *cert. denied*, 409 U.S. 880 (1972), *Harshaw v. United States*, 542 F.2d 455, 457 (8th Cir. 1976) (failure to conduct investigation); *United States ex rel. Crispin v. Mancusi*, 448 F.2d 233 (2d Cir.), *cert. denied*, 404 U.S. 967 (1971) (failure to interview key trial witnesses). Decisions not to call witnesses and not to pursue certain avenues of investigation are matters that the courts leave to the discretion of trial counsel. See *United States v. Yanishefsky*, *supra*;

* Indeed, Acevedo's trial counsel strongly and successfully resisted an attempt by the Government to re-open its case to have the witness testify in rebuttal to Acevedo's contentions that he had been framed. (Tr. 166-67).

United States v. Flannery, 467 F.2d 201 (9th Cir. 1972), cert. denied, 409 U.S. 1125 (1973); *Sherrill v. Wyrick*, 524 F.2d 186 (8th Cir. 1975), cert. denied, 424 U.S. 923 (1976); *United States ex rel. Walker v. Henderson*, 492 F.2d 1311 (2d Cir.), cert. denied, 417 U.S. 972 (1974); *United States v. Ladley*, 517 F.2d 1190 (9th Cir. 1975). See also, *United States v. Daniels*, 558 F.2d 122 (2d Cir. 1977) (no deprivation of effective assistance of counsel in attorney's failure to demand pre-trial *Wade* identification hearing). Acevedo offers no sound reason in policy or the facts of this case to disturb the settled rule that trial counsel must be at the helm of the defense strategy.

In sum, the record here demonstrates that Acevedo's attorney at trial, faced with a hostile client and compelling proof of guilt, provided his client with competent, conscientious and dedicated representation. Defendant's present claim, therefore, must be rejected.

POINT IV

The Sentence Imposed on Acevedo by the District Court Was Proper and Not Reviewable.

As his final point Acevedo contends that the District Court abused its discretion by imposing consecutive five year sentences on each of the three counts in the indictment. Defendant alleges that this sentence was meted out solely because of Acevedo's contumacious conduct and therefore was improper.

This Court consistently has declined to review sentences within the statutory maximum unless the record indicates reliance by the trial court on materially incorrect information or some constitutionally impermissible practice in connection with the imposition of sentence. *United States v. Seijo*, 531 F.2d 694 (1976); *United*

States v. Estremera, 531 F.2d 1103, 1113 (2d Cir. 1976). See also, *Dorszynski v. United States*, 418 U.S. 424 (1974); *United States v. Tucker*, 404 U.S. 443, 447 (1977); *United States v. Lamont*, 565 F.2d 212 (2d Cir. 1977). Here, the record simply is devoid of any suggestion that the trial court relied on defendant's contumacious conduct in imposing sentence. Indeed, to the contrary, the record explicitly establishes that the trial judge, far from punishing Acevedo for his outrageous behavior in the courtroom, vacated eight citations of contempt after Acevedo apologized at his sentencing. (Tr. of Proceedings, September 7, 1977, at 3, 16). Thus, there simply is no basis to review the sentence, which clearly was within the statutory limit.

Finally, even if it is considered on its merits, the sentence imposed here fully was warranted. The charges obviously were serious and involved repeated dangerous conduct. Acevedo had demonstrated a complete indifference to the use of the weapons he sold. Finally, defendant had had a prior serious involvement with the law, for which he previously had been incarcerated, and indeed was on parole while dealing in guns in the instant case. (Tr. 18; Tr. of Proceedings, September 7, 1977, at 12). Under all these circumstances defendant's claim as to the harshness of the sentence must be rejected.*

* Although the record simply does not suggest that Judge Duffy took account of Acevedo's contumacious conduct as a factor in imposing sentence, clearly the District Court would have been entitled to do so. It is settled in this Circuit that a sentencing judge is entitled to impose, within statutory limits, a more severe sentence than would otherwise have been pronounced on the basis of facts relating to bad acts other than those of which the defendant stands convicted. As noted in *United States v. Seijo*, *supra*, 537 F.2d at 700 n.7:

"For example, the sentencing judge may consider crimes on which there has been no conviction, *United States v. Cifarelli*, 401 F.2d 512, 514 (2d Cir.), *cert. denied*, 393

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
 Southern District of New York,
 Attorney for the United States
 of America.*

RAYMOND A. LEVITES,
 ROBERT J. JOSSEN,
*Assistant United States Attorneys,
 Of Counsel.*

U.S. 987 (1968); evidence of counts on which a defendant had been acquitted, *United States v. Sweig*, 454 F.2d 181, 184 (2d Cir. 1972); counts of an indictment dismissed by the government, *United States v. Needles*, 472 F.2d 652, 655 (2d Cir. 1973); hearsay evidence, *United States v. Rosner*, 485 F.2d 1213 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974); and evidence obtained in violation of the Fourth Amendment, *United States v. Schipani*, 435 F.2d 26 (2d Cir. 1971), *cert. denied*, 401 U.S. 983 (1971).

See also, United States v. Rosner, 549 F.2d 259 (2d Cir. 1977); *Drayton v. People of New York*, 556 F.2d 644 (2d Cir. 1977); *United States v. Harris*, 558 F.2d 366 (7th Cir. 1977). *See generally, United States v. Hendrix*, 505 F.2d 1233 (2d Cir. 1974). In this respect, a defendant's repeated contumacious conduct in court not only may be criminal in nature, but at a minimum, underscores a contempt for lawful authority and orderly procedures which obviously makes unlikely the prospect of his swift and complete rehabilitation.

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Raymond Levites being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the 13th day of February, 1978,
he served a copy of the within brief by placing the same⁸
in a properly postpaid franked envelope addressed:

Meyer & Light
Attorneys at Law
66 Court Street
Brooklyn, New York 11201

And deponent further says that he sealed the said envelope
and placed the same in the mail box for mailing at One St. Foley
Square Andrew's Plaza, Borough of Manhattan, City of New York. XXXXXXXX

Raymond Levites

Sworn to before me this

13th day of February, 1978.

Jacob Laufer
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Notary Public, State of New York
No. 24-402171
Qualified in Kings County
Commission Expires March 30, 1979